

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,¹

Date Issued: July 3, 2018

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2018-0060

v.

Hearing Dates: June 18 and 22, 2018

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution, Room 112
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner contends that DCPS' Individualized Education Plans (IEPs) for Student for the 2016-2017 and 2017-2018 school year placed Student in an overly restrictive educational environment. Petitioner also alleges that DCPS violated the IDEA's procedural requirements in developing the IEPs and failed to fully implement Student's IEP in fall 2017.

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on March 5, 2018, named DCPS as respondent. The parties met for a resolution session on March 14, 2018 and did not reach an agreement. On April 5, 2018, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The due process hearing in this case was originally set for May 3 and 4, 2018. On April 25, 2018, I granted the Petitioner's unopposed motion for a continuance of the hearing dates and for a 45-day extension of the final decision due date to July 6, 2018.

The due process hearing was held before this Impartial Hearing Officer on June 18 and 22, 2018 at the Office of Dispute Resolution Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. DCPS waived making an opening statement. Petitioner testified and called as witnesses BEHAVIORAL SERVICES DIRECTOR, CES TEACHER, LEA REPRESENTATIVE and EDUCATIONAL CONSULTANT. DCPS called as witnesses SPEECH-LANGUAGE PATHOLOGIST (SLP) and CES SPECIALIST. Petitioner's Exhibits P-1 through P-34 were admitted into evidence without objection. Exhibit P-35, a digital video recording, was admitted over DCPS' objection. Respondent's Exhibits R-1 through R-47 (including Exhibit R-19A) were admitted into evidence without objection. Counsel for both parties made closing arguments. There was no request to file post-hearing briefs.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the April 5, 2018

Prehearing Order:

1. Whether DCPS denied Student a free appropriate public education (FAPE) by changing Student's placement from the CITY SCHOOL 1 Communication & Education Support (CES) program to the CITY SCHOOL 2 CES program without parental involvement, IEP team involvement, or discussing the impact such a change would have on Student's ability to access academic instruction in the general education setting;
2. Whether DCPS denied Student a FAPE by failing to implement Student's May 2017 IEP from August 2017 through October 24, 2017, when Student was not provided academic instruction inside general education;
3. Whether DCPS denied Student a FAPE by failing to develop appropriate IEPs on October 24, 2017 and February 8, 2018, due to the following:
 - a. Failure to provide appropriate special education and supplementary aides and services, based on peer-reviewed research, and a statement of program modifications that will enable Student to advance appropriately towards attaining the annual goals, be involved in and make progress in the general education curriculum, and to be educated and participate with other children with disabilities and nondisabled children;
 - b. Failure to include a behavior intervention plan or other positive behavior intervention strategies to allow Student to access the general education setting;
 - c. Failure to properly consider the strengths of the child, the concerns of the parent, and the academic, developmental, and functional needs of the child when the IEP failed to include any specialized instruction or academic instruction in the general education setting, including the use of positive behavior intervention strategies, sensory supports, supplemental aids and services, or a Applied Behavior Analysis (ABA) instructional aide;
 - d. Failure to include a regular education teacher in the development of the IEP to determine appropriate positive behavioral interventions and supports and other strategies for the child, supplementary aids and

services, program modifications, and support for school personnel consistent with 34 CFR § 300.320(a)(4).

4. Whether DCPS denied Student a FAPE by failing to provide an appropriate educational placement in the CES program at City School 1 and City School 2 due to the failure to comply with the least restrictive environment (LRE) mandate of the IDEA, failure to provide access to nondisabled peers for academic instruction, placing Student in a setting with peers functioning on a substantially lower level and failing to provide access to general education curriculum including the failure to provide a general education report card.

For relief in this case, Petitioner originally requested as follows:

- that DCPS be ordered to fund services from an independent Board Certified Behavior Analyst (BCBA) and ABA aide as needed to develop an appropriate IEP for Student, including consultative services necessary to observe Student in Student’s educational program, make recommendations for appropriate integration in the general education setting, and to serve as Student’s ABA aide to allow Student to participate in the general education setting;
- Alternatively, following the development of an independent ABA plan, that DCPS shall be ordered to ensure that the Student’s IEP be amended to include an ABA trained and qualified aide to support Student in the general education setting;
- that DCPS shall be ordered to convene an IEP meeting to revise Student’s IEP to include academic instruction inside general education with appropriate supplemental aids and services, accommodations, and modifications, such as an ABA aide, the use of positive behavior intervention strategies or a Behavior Intervention Plan (BIP), sensory supports and other strategies identified as being necessary for Student, and an appropriate least restrictive environment (LRE) that allows for academic instruction in the general education setting and
- that DCPS be ordered to fund a compensatory education plan for Student.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer’s Findings of Fact are as follows:

1. Student, an AGE child, resides with Mother in the District of Columbia.

Testimony of Mother.

2. Student is a “child with a disability” as defined by the IDEA and eligible for

special education and related services under the disability classification Autism Spectrum Disorder (ASD). Exhibit P-10.

3. Student was initially evaluated by DCPS' Early Stages in April 2014, subsequent to a medical diagnosis of ASD, and found eligible for special education services. At the time, the parents declined DCPS' special education services. In the spring of 2015, the parents referred Student for a reevaluation in order for Student to transition to Early Childhood special education. The Early Stages psychologist evaluated Student through informant interviews, questionnaires and observations. Student would not sit for testing purposes or to attend to adult-led tasks. The psychologist reported that there were no concerns for Student's cognitive skills; that Student needed to work on social skills, communicating and participating with peers and adults; that group work was an area of difficulty; that Student had some aggression and tantrums at daycare; that Student had difficulty following directions and that respondents reported on behavior rating scales that Student had mild, but persistent, elevations across a variety of behavioral areas including hyperactivity, aggression, anxiety, attention problems and atypicality. The psychologist reported that Student continued to meet criteria for ASD. Exhibit P-13.

4. Student's initial IEP was developed at Early Stages on July 23, 2015. The IEP identified as areas of concern Adaptive/Daily Living Skills; Cognitive (difficulty demonstrating cognitive abilities in the classroom); Communication/Speech and Language; Emotional, Social and Behavioral Development and Motor Skills/Physical Development. The IEP team provided for Student to be placed in a self-contained educational setting with full time special education supports. Exhibit P-1.

5. Student was enrolled for a short time in DCPS, but left in October 2015.

Student was re-enrolled and attended City School 1 beginning in August 2016. Since August 2017, Student has attended City School 2. Testimony of Mother, Exhibit P-12.

6. On September 13, 2016, an updated IEP was developed for Student following Student's entering City School 1. A 30-day review was completed and Student's present levels of performance, goals and service hours were updated. In the September 13, 2016 IEP, Mathematics, Reading, Adaptive/Daily Living Skills; Communication/Speech and Language and Motor Skills/Physical Development were identified as areas of concern. Student was placed in the CES self-contained classroom for 16.75 hours per week. Student was to push-in to the general education classroom for 5 hours per week to aid in social interaction with typically developing peers. Student attended the general education classroom in the mornings for social meeting time and reading. Exhibits P-2 and R-6, Testimony of Mother.

7. At the May 23, 2017 IEP team meeting, Mother requested increased time for Student in general education. The general education teacher reported that Student had made much progress since the beginning of the year, Student was making progress with social interactions, Student engaged with peers and Student benefitted from not transitioning with an adult. The general education teacher reported that Student was not ready for academic instruction in general education. Exhibit R-12.

8. At the May 23, 2017 IEP team meeting, Mother requested that Student's IEP be amended to reflect on the IEP the number of minutes per week Student spent in general education for morning meeting, partner reading and independent reading. The IEP team revised Student's IEP to provide that for the 2017-2018 school year, Student initially would attend the general education classroom each day for 45 minutes (225 minutes per week), which would increase gradually throughout the year based on

Student's performance and the IEP team's decisions. Exhibit P-4.

9. In spring 2017, CES MANAGER telephoned Mother to tell her that because Student's classroom at City School 1 was overcrowded, Student would be moved to the CES classroom at City School 2 for the 2017-2018 school year. Mother was told that Student would continue to have the same access to general education peers.

Testimony of Mother. On June 21, 2017, DCPS sent Mother a location of services letter stating that City School 2 had been identified as Student's location of services for the 2017-2018 school year and that no revision to Student's IEP was being proposed.

Exhibit P-25.

10. On October 20, 2017, City School 2 convened a multidisciplinary team (MDT)/Transition Meeting for Student. Among the school participants were GENERAL EDUCATION TEACHER and CES Teacher. The purpose was to gather information about IEP implementation at City School 1. At the meeting, Mother stated she wanted Student to transition to general education with the support of a Board Certified Behavior Analyst (BCBA). The MDT team concluded that instead of Student's going to the regular education classroom unsupported, Student would receive 3 hours per week of specialized instruction in reading in a small group, outside of general education, with other Y GRADE students who had IEPs and that Student would participate in social-emotional learning with Y Grade for at least 30 minutes per week. Student was to continue to have 5 unsupported mainstream hours per week in general education during Specials classes. Exhibit R-21.

11. At City School 2, Student's primary placement was the CES classroom with up to 8 students, taught by a special education teacher and two paraprofessionals. The CES classroom uses the STAR curriculum, developed for children with ASD, instead of

the general education curriculum. The STAR curriculum is based on ABA principles. Most of the children in the CES classroom also had ASD disabilities and needed support with verbal skills and social skills. Students in the CES classroom do not receive report cards, because they are not considered to be on the high school diploma track. The CES classroom does not cover the same curriculum material as the general education classroom. Testimony of CES Teacher.

12. For most of the 2017-2018 school year, Student was on a higher level than the CES classmates. Student mastered the STAR curriculum around midyear. On the Edmark Reading Program, Student moved a lot faster than the other children in the class and finished the Edmark curriculum by spring 2018. Student flourished in math, Student's favorite subject, over the school year. Testimony of CES Teacher.

13. CES Teacher was concerned when Student transferred to City School 2 because Student's IEP provided for only 18 hours per week of Specialized Instruction outside of general education. This conflicted with the rule that for a child to be placed in the CES classroom, the child's IEP needed to provide for a minimum of 20 hours per week of special education outside general education. CES Teacher reached out to DCPS' central office and the solution arrived at was for Student to attend Specials classes (Art and Music), unaccompanied, in the general education setting. Although Student was in Y Grade, Student did not go to the Y Grade general education classroom for any academics. Student attended Specials classes with children from the X GRADE general education class, because this class was much more calm and was a better fit for Student than the Y Grade classroom. From August to October 2017, Student received reading support outside the CES classroom, but not inside the general education classroom. Testimony of CES Teacher.

14. On January 10, 2018, LRE OBSERVER from DCPS' central office conducted a classroom observation of Student on the referral of CES Teacher, out of concern that Student should have more academic exposure. LRE Observer recommended that Student's academic needs might be more appropriately addressed in an Early Learning Support (ELS) classroom. She wrote that students in ELS classrooms have full-time IEPs and that classroom instruction was based on a curriculum aligned to the Common Core state standards. LRE Observer recommended that Student's IEP team meet with Mother to consider whether the CES program or the ELS program would be more appropriate for Student to successfully access the general education curriculum. Exhibit R-25.

15. Student's IEP team at City School 2 met on February 7, 2018. Among the school participants was CES Teacher, who is dual certified in special education and early childhood education. Testimony of CES Teacher. The IEP team updated Student's IEP with present levels of performance and annual goals. The IEP team reported Student's progress since enrolling at City School 2. It was noted in the Motor Skills/Physical Development section of the IEP that when Student first started attending City School 2 at the beginning of the year, Student struggled with transitioning to and from therapy and with focusing and participating in activities for 10 minute intervals. Student often required maximum prompts for redirection and would throw tantrums involving ripping up work, throwing objects, aggression (hitting and pulling therapist's hair), crying, and screaming when asked to complete non-preferred adult-directed activities. Since the beginning of the school year, Student's familiarity with the school and rapport with the therapist improved. Student made great strides in therapy and responded well to the use of a token system to earn preferred activities. Student had not had a

behavioral outburst since mid-September 2017. Student was then able to attend to a task for more than 10 minutes on a consistent basis. Prompts during a session usually had to do with correcting sitting posture or correcting written work rather than redirecting Student to a task. Exhibit P-7.

16. At the February 7, 2018 IEP team meeting, Mother stated that Student was being delayed because being placed in the CES classroom and she objected to the ELS classroom proposal as “ping-ponging.” The February 7, 2018 IEP provided for Student to receive 21 hours per week of Specialized Instruction outside general education, including 18 hours per week in the CES classroom and 3 hours per week in the small group reading intervention program. The IEP specified that Student would also attend Specials independently, in general education, for 5 hours per week. The IEP provided that Student did not require the support of a dedicated aide. Exhibit P-6.

17. DCPS administered the Woodcock-Johnson IV Tests of Achievement (WJ-IV) to Student in May 2018. Student tested mostly on grade level, or slightly below. These WJ-IV results aligned with how Student performed in class. Testimony of CES Teacher, Exhibit P-11.

18. DCPS PSYCHOLOGIST conducted a Psychological Triennial Reevaluation of Student in April and May 2018. In her May 25, 2018 report, the psychologist reported that Student continued to meet criteria for the ASD special education disability classification. She also reported, *inter alia*, that Student continued to have difficulties with repetitive movements during instruction in large group activities and with maintaining attention on non-preferred activities; that Student could maintain focus with verbal reminders and one-on-one support; that Student had shown academic growth with the STAR curriculum by mastering all levels and that Student’s WJ-IV

results showed Student was performing in the average range overall. Exhibit R-36.

19. Student's MDT/IEP team at City School met on May 29, 2018 and determined that Student continued to meet IDEA eligibility criteria as a student with an ASD disability. Exhibit R-35.

20. At the May 29, 2018 meeting, Student's IEP team proceeded to update Student's IEP. Petitioner's Counsel requested that Student be moved from the CES classroom to general education, with the support of a dedicated aide who is Applied Behavior Analysis (ABA) qualified or trained aide. The IEP team decided that beginning August 20, 2018, Student's Special Education Services would be changed to 5 hours per week of Specialized Instruction, outside general education, for Reading and 2.5 hours per week in general education, each, for Mathematics and Written Expression. (The IEP states "2.5 hr per day" for Written Expression. The parties stipulated at the hearing that this was a typographical error and that the IEP team had agreed that Student would receive 2.5 hours per week of Specialized Instruction in general education for Written Expression). Except for time for related services outside general education, Student would be placed in the general education classroom for the remainder of the week. The IEP specifies that Student does not require the support of a dedicated aide. Exhibit P-7. In a Prior Written Notice issued after the meeting, it is stated that an ABA qualified staff was "not a service that this team can provide at this meeting." Exhibit R-39.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

1. Did DCPS deny Student a FAPE providing overly restrictive educational placements in the self-contained CES classrooms at City School 1 and City School 2 for the 2016-2017 and 2017-2018 school years?

The core of the parent's complaint in this case is that since the fall of 2016, DCPS has allegedly failed to ensure that Student's IEPs provided sufficient time in the general education classroom setting. After the parent filed her due process complaint, the City School 2 IEP team revised Student's IEP to provide for Student's full-time placement in the regular classroom setting, except for a few hours per week of pull-out services. For the 2016-2017 and 2017-2018 school years, Student's IEPs provided for Student's placement, nearly full-time, in Communication and Education Support (CES) classrooms at City School 1 and City School 2. In the parent's view, the least restrictive environment (LRE) for Student was a general education classroom with appropriate modifications and the support of an ABA-trained aide. DCPS maintains that Student's IEPs were appropriate at the time they were developed.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court’s assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA’s] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Moradnejad at 274-75. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017), the U.S. Supreme Court elaborated on the standard for what constitutes an appropriate IEP:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

Andrew F., 137 S.Ct. at 999. Under the IDEA’s LRE mandate, “children with disabilities must be ‘placed in the ‘least restrictive environment’ so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate.” *Damarcus S. v. District of Columbia*, 190 F. Supp. 3d 35, 54–55 (D.D.C. 2016), citing *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F.Supp.2d 57, 60 (D.D.C.2010), (citing 20 U.S.C. § 1412(a)(5)(A)). “Mainstreaming” helps to ensure that disabled students “meet developmental goals” and are “prepared to lead productive and independent adult lives.” 20 U.S.C. § 1400(c)(5). “Only ‘when the nature or severity’ of a child’s disability is such ‘that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily’ should a child be

segregated.” *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998), citing 20 U.S.C. § 1412(5).

In a parallel claim, Petitioner contends that Student’s October 24, 2017 and February 7, 2018 IEPs were inadequate because these IEPs lacked special education and supplementary aides and services, behavior intervention plans, ABA programming and other program modifications to enable Student to make appropriate progress in a general education setting with other disabled and typically developing peers. Because these IEPs placed Student in the CES program at City School 2, which was designed for children with ASD disabilities and was based on Applied Behavior Analysis principles, the IEPs did not provide supplemental behavior supports that Student would need in a regular classroom educational placement.

In the District of Columbia, the burden of demonstrating the appropriateness of an IEP, including whether a mainstream placement received appropriate consideration, rests on DCPS. *See* D.C. Code § 38-2571.03(6). The courts in this jurisdiction do not appear to have adopted an explicit test to analyze whether a contested IEP places a child in the least restrictive environment. Elsewhere, most of the courts which have addressed this issue have adopted a two-pronged test first pronounced by the Fifth Circuit in *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1039 (5th Cir.1989). *See L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir.2004); *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1403–04 (9th Cir.1994) (slightly modified version); *Oberti v. Clementon Sch. Dist.*, 995 F.2d 1204, 1215 (3d Cir.1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (11th Cir.1991); *P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Ed.*, 546 F.3d 111, 120 (2d Cir. 2008). The *Daniel R.R.* test as, as elucidated and augmented by the Third Circuit in *Oberti* provides:

In sum, in determining whether a child with disabilities can be educated satisfactorily in a regular class with supplemental aids and services (the first prong of the two-part mainstreaming test we adopt today), the court should consider several factors, including: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

If, after considering these factors, the court determines that the school district was justified in removing the child from the regular classroom and providing education in a segregated, special education class, the court must consider the second prong of the mainstreaming test—whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate.

995 F.2d at 1217–18 (footnote omitted). Several circuit court decisions further provide that the expense to the district of supplementary aides and services necessary to maintain the child in the regular classroom must also be considered. *See, e.g., L.B., supra*, 379 F.3d at 977. I do not consider that factor here, because DCPS has not raised the costs of a classroom aide as a defense. *See P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Ed., supra*, 546 F.3d at 120 n.4.

i. Steps taken by DCPS to Accommodate Student in Regular Education

The IDEA requires that before placing a child in a self-contained special education program, the school must consider intermediate steps such as providing “aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with section 1412(a)(5) of this title.” *A.S. ex rel. S. v. Norwalk Bd. of Educ.*, 183 F. Supp. 2d 534, 545 (D. Conn. 2002), citing 20 U.S.C. § 1401(29). A classroom aide is a supplementary aid or service that must be provided in an IEP, if required to assist a child with a disability

to benefit from special education and to be educated with nondisabled children in regular classes to the maximum extent appropriate. *See* 34 CFR §§ 300.42, 300.114(a), 300.115(b)(2).

When Student enrolled at City School 1 at the start of the 2016-2017 school year, Student's DCPS IEP provided for Student's placement in the self-contained CES classroom with 5 hours per week of push-in services in the general education classroom for social interaction with typically developing peers. At the May 22, 2017 IEP team meeting, the City School 1 general education teacher reported that while Student had made good progress in the general education classroom, Student was not yet ready for academic instruction in that setting. The IEP team revised Student's IEP to provide that for the 2017-2018 school year, Student initially would attend the general education classroom each day for 45 minutes (225 minutes per week), which would increase gradually throughout the year based on Student's performance and the IEP team's decisions. The IEP did not provide for a one-on-one aide for Student.

At the due process hearing in this case, Petitioner's expert, Educational Consultant, observed that by February 2017, Student was performing extremely well at City School 1 and was mastering the IEP goals and CES curriculum. She opined that as of that time, it would have been appropriate to place Student in the general education classroom, supported by an ABA-trained aide to implement a Behavior Intervention Plan grounded in ABA principles. The courts in this jurisdiction have repeatedly cautioned that neither the IDEA nor reason countenance "Monday Morning Quarterbacking" in evaluating the appropriateness of a child's placement. *See, e.g., Pavelko v. District of Columbia*, 288 F. Supp. 3d 301, 307 (D.D.C. 2018). Educational Consultant was not involved with Student in the 2016-2017 school year. She did not

attend the May 2017 IEP team meeting. She has never observed Student at school or spoken to Student's educators either at City School 1 or City School 2. According appropriate deference to the educators who worked with Student, I find Educational Consultant's hindsight opinion, based on her review of Student's education records over a year after the IEP meeting, less persuasive than the contemporaneous opinion of Student's general education teacher and the input from the other members of Student's IEP team. *See T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007) (DCPS personnel had special education expertise requiring deference.) I find that DCPS has met its burden of persuasion that the measures taken by the City School 1 IEP team at the May 23, 2017 IEP meeting to accommodate Student in the regular education setting were appropriate.

By the middle of the 2017-2018 school year at City School 2, Student had made considerable progress. CES Teacher testified that at the start of the school year, Student exhibited noncompliance, some property destruction and temper tantrums when accessing the general education setting. But since the 2017-2018 winter break, CES Teacher had not heard about any issues with Student in the general education setting except for minor tantrums. Student's Occupational Therapist similarly reported that Student had made great strides in therapy, had not had a behavioral outburst since mid-September 2017 and was able to attend to a task for more than 10 minutes on a consistent basis. In January 2018, an outside LRE observer from DCPS' central office recommended that Student be moved to an Early Learning Support (ELS) classroom because the CES classroom at City School 2 was no longer Student's least restrictive environment. When Student's IEP team convened on February 7, 2018, it was incumbent upon the IEP team, informed by Student's progress, to consider whether

Student could then be appropriately educated in the regular classroom, with the use of supplementary aids and services. However, the IEP team made no changes to the Specialized Instruction services in Student's October 2017 amended IEP which retained Student's educational placement in the CES classroom and provided for Student to be with nondisabled peers in the general education classroom for only 45 minutes per day. I conclude that DCPS has not met its burden of persuasion that as of the February 2018 IEP team meeting, it had made reasonable efforts to accommodate the Student in a regular classroom.

ii. Student's Ability to Receive an Educational Benefit from Regular Education

The evidence in this case establishes that Student is able to receive educational benefit from the regular education setting. When Student's IEP team met in June 2018, after the due process complaint in this case was filed, the team determined that Student should be placed full-time in the general education setting and pulled out for Specialized Instruction for only 5 hours per week. As noted above, CES Teacher testified that since the winter break in the 2017-2018 school year, she had not heard about Student's having behavior incidents in the general education classroom. DCPS' witness, CES Specialist, testified that in spring 2018, she observed Student's benefitting from interaction with typically developing peers at recess.

iii. The Effect Student's Presence Has on the Regular Classroom

As a child needing a Behavior Intervention Plan, visual prompts, support for executive functioning and similar services developed for children with ASD disabilities, Student's presence in the general education classroom undoubtedly has an impact on typically developing peers in the classroom. CES Specialist testified that Student was a

disruption to Student's general education peers, but affirmed that in spite of this distraction, Student's typically developing peers were able to continue to learn. Moreover, the hearing officer notes that Student was not provided an aide while in the general education setting. As the Court emphasized in *Oberti, supra*, "in considering the possible negative effect of the child's presence on the other students, the court must keep in mind the school's obligation under the Act to provide supplementary aids and services to accommodate the child's disabilities." *Id.* at 1217. I find from the evidence at the due process hearing that it is probable that Student's education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily.

Applying the factors from the first prong of the *Daniel R.R.* test, *supra*, I conclude that DCPS' failure to ensure that the February 7, 2018 IEP team revised Student's IEP to substantially increase Student's opportunity to be educated in an integrated setting with children who are not disabled violated the IDEA's LRE requirement and resulted in denial of FAPE. Having found that Student's education in the regular classroom, with the use of supplementary aids and services, can likely be achieved satisfactorily, I do not reach the second prong of the *Daniel R. R.* test, whether Student has been "mainstreamed to the maximum extent appropriate." *See Oberti, supra*, 995 F.2d at 1218.

2. Did DCPS deny Student a FAPE by not including a general education teacher as participant in the October 20, 2017 and February 7, 2018 IEP team meetings?

Petitioner alleges that DCPS violated IDEA procedures by not including regular education teachers on Student's October 20, 2017 or February 7, 2018 IEP teams. *See* 34 CFR § 300.321(a)(2) (IEP team must include not less than one regular education

teacher of the child.). Regular Education Teacher attended the October 20, 2017 meeting. CES Teacher, who is dual-certified in special education and early childhood education attended both the October 20, 2017 and February 7, 2018 meetings. *See L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909-10 (9th Cir. 2008) (No stringent requirement that the child's current regular education teacher attend the IEP meeting.) Moreover, under the IDEA, procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

34 CFR § 300.513(a)(2). Even if City School 2 did err by not having Student's regular education teacher attend the February 7, 2018 IEP meeting, there was no showing that this omission resulted in denial of FAPE.

3. Did DCPS deny Student a FAPE by changing Student's placement from the City School 1 CES program to the City School 2 CES program without parental involvement, IEP team involvement, or discussing the impact such a change would have on Student's ability to access academic instruction in the general education setting?

In June 2017, due to overcrowding in the CES classroom at City School 1, DCPS changed the location of services for the implementation of Student's IEP from City School 1 to the CES classroom at City School 2. Petitioner contends that this unilateral action violated the parent's right to participate in any decision as to Student's educational placement. *See* 34 CFR § 300.501(c) (School district must ensure that parent is a member of any group that makes decisions on the educational placement of the child.) I find that DCPS' changing Student's service location from City School 1 to

City School 2 did not constitute a change in Student’s educational placement requiring parental participation. At the time of the June 2017 change in school location, Student’s “educational placement” consisted of the educational program described in the May 24, 2017 amended IEP, namely 18 hours per week of Specialized Instruction in the self-contained CES classroom and 3 hours per week of small-group reading instruction. The parent alleges that at the beginning of the 2017-2018 school year, City School 2 did not integrate Student in the general education classroom to the same extent as at City School 1. However, there was no evidence that the special education programs offered Student at City School 1 and City School 2 were not substantially and materially similar. *See James v. District of Columbia*, 949 F. Supp. 2d 134, 137–38 (D.D.C. 2013). While the IDEA requires a student’s parents to be part of the team that creates the IEP and determines the educational placement of the child, the Act does not explicitly require parental participation in site selection where no change in services is foreseen. *Id.* I find therefore that DCPS’ change of Student’s service location, for the 2017-2018 school year from City School 1 to City School 2, did not require DCPS to involve Mother or Student’s IEP team, and there was no denial of a FAPE.

4. Did DCPS deny Student a FAPE by failing to provide academic instruction inside general education from August 2017 through October 24, 2017?

At the May 23, 2017 IEP team meeting at City School 1, the IEP team determined that for the 2017-2018 school year, Student initially would push in to the general education classroom each day for 45 minutes, which would increase gradually throughout the year based on Student’s performance and the IEP team’s decisions. Subsequent to the meeting, DCPS changed Student’s location of services from City School 1 to City School 2. The parent alleges that until an IEP team meeting on October

24, 2017, City School 2 did not implement the decision of the City School 1 IEP team that Student would be pushed in to the general education classroom for 45 minutes per day. The parent has the burden of persuasion on this claim.

In *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34 (D.D.C. 2016), the U.S. District Court analyzed when a failure to fully implement an IEP results in a denial of FAPE:

To establish a deprivation of educational benefits, a moving party “must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000) To meet this standard, a moving party need not prove that the student suffered “educational harm” because “the Court has no way of knowing how much more progress” a student might have made in the absence of a failure to implement. *Wilson v. Dist. of Columbia*, 770 F.Supp.2d 270, 275, 276 n. 2 (D.D.C.2011) (emphasis original). Generally, in analyzing whether a student was deprived of an educational benefit, “courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” *Wilson*, 770 F.Supp.2d at 275.

Beckwith, supra, 208 F. Supp. 3d at 49.

CES Teacher testified that when Student was placed in her CES classroom at City School 2, she was concerned that Student’s IEP provided for only 18 hours per week in the CES classroom. She reached out to DCPS’ central office and came up with a plan for Student to go unaccompanied to Specials classes in general education. Student was placed in the lower, X Grade, regular classroom for Specials because that class was much calmer and a better fit for Student than the Y Grade regular classroom. Mother also testified that Student went to the X Grade class for Specials classes for one hour per day. I find that Mother has not met her burden of persuasion that City School 2 did not implement the decision of the City School 1 IEP team that Student would be pushed in to the general education classroom for 45 minutes per day.

Remedy

For relief in this case, the parent originally requested that Student's IEP be revised to provide for increased mainstreaming with appropriate supplemental aids and services to include an ABA-trained aide. At an IEP team meeting on May 29, 2018, after the complaint in this case was filed, Student's City School 2 IEP team decided that Student would be placed full-time in the regular education setting, except for 5 hours per week of Specialized Instruction for Reading, outside general education. However, the IEP team decided that Student would not initially be provided a dedicated aide.

DCPS' expert, CES Specialist, testified that DCPS' practice for children moved to a general education setting was to attempt to serve the child with a transition plan, before determining whether the child needed a dedicated aide. However, this expert, who is a Board Certified Behavior Analyst (BCBA), agreed that for this Student, it was important for ABA strategies to be implemented by trained staff across the entire school domain. Petitioner's expert, Behavior Services Director, also a BCBA, opined that Student would be unable to independently engage in on-task behaviors in the general education classroom and that to be mainstreamed, Student would require an ABA aide or a teacher trained in ABA methodologies. I found her opinion to be credible. DCPS' plan to wait to see how Student responds to full-time mainstreaming before determining whether Student needs a classroom aide is not "reasonably calculated to enable [Student] to make progress appropriate in light of the child's circumstances." *See Andrew F.*, 137 S.Ct. at 999. Therefore, I will order DCPS to ensure that Student's IEP is amended, prior to start of the 2018-2019 school year, to provide for staffing Student's general education classroom with personnel trained to implement an ABA-based behavior plan for Student.

Petitioner has also requested a compensatory education award to compensate Student for the denials of FAPE in this case. “If a hearing officer concludes that the school district denied a student a FAPE, he has ‘broad discretion to fashion an appropriate remedy,’ which may include compensatory education. *See B.D. v. District of Columbia*, 817 F.3d 792, 800 (D.C. Cir. 2016). The compensatory education inquiry requires ‘figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.’ *Id.* at 799.” *Butler v. District of Columbia*, Case No. 16-cv-01033 (D.D.C. Aug. 14, 2017). In this case, I have determined Student was denied a FAPE by the failure of the City School 2 IEP team in February 2018 to move Student to a more mainstream setting. It is undisputed that in the CES classroom setting, Student continued to make good academic progress and that by the end of the 2017-2018 school year, Student was mostly on grade level. Unfortunately, the evidentiary record sheds no light on what position Student would now be in – had Student been moved to the general education classroom in February 2018.

In the D.C. Circuit’s *B.D.* decision, *supra*, in the context of compensatory education awards, the Court encouraged hearing officers to order further assessments if needed to discern a student’s needs. (“Assessments sufficient to discern B.D.’s needs and fashion an appropriate compensatory education program may now exist. But it may also well be that further assessments are needed. If so, the district court or Hearing Officer should not hesitate to order them . . .” *Id.* at 800.) It appears that the D.C. Circuit anticipated that the hearing officer or court would keep the evidentiary record open until further compensatory education assessments are completed. However, because my Hearing Officer Determination is due by July 6, 2018, *see* 34 CFR § 300.515(a), it is not permissible to defer my final decision in this case until after a

compensatory education evaluation is completed. Accordingly, in my final order, I will order DCPS to obtain a compensatory education evaluation of Student to assess what award is needed to get Student back to the place where Student would now be, if Student had been mainstreamed following the February 7, 2018 IEP team meeting. If, after Student's IEP team has reviewed the ordered assessment, Petitioner and DCPS are unable to agree on a compensatory education award "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place," *see Reid, supra*, Petitioner may request compensatory education relief through a new due process hearing request.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. Within 10 business days of the date of this order, DCPS shall ensure that Student's IEP is amended to provide for Student's general education classroom to have full-time ABA-trained personnel at a staffing level sufficient to effectively implement individualized ABA methodologies and behavior support for Student in the inclusion setting. Student's IEP team shall not be precluded from "fading" this service, as appropriate, as Student acclimates to the new setting;
2. Unless the parent and DCPS reach a voluntary agreement on compensatory education for Student, DCPS must obtain a compensatory education assessment by a qualified professional to assess Student's compensatory education needs resulting from the denial of FAPE determined in this decision – namely the City School 2 IEP team's decision at the February 7, 2018 IEP team meeting not to mainstream Student. If DCPS and Petitioner remain unable to agree upon an appropriate compensatory education remedy, informed by the recommendations of the compensatory education evaluator, Petitioner may request another due process hearing to seek a compensatory education award for the denial of FAPE determined in this decision and
3. All other relief requested by the Petitioner herein is denied.

Date: July 3, 2018

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record
Student Hearing Office
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team